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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

JAMES M. MURPHY, DISTRICT JUDGE OF THE FOURTH JUDICIAL DISTRICT OF NEBRASKA,

APPELLANT,

VS.

EUGENE L. HUNT,

APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California

state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have a substantial impact upon the pretrial right to bail of many persons being represented by this office, now and in the future, as well as upon the public as a whole. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the appellee herein.

This brief is filed pursuant to Rule 36 of the Rules ofthe Supreme Court of the United States. Consent to the filing of the brief has been given by the Office of the Attorney General of the State of Nebraska and by the Office of the Douglas County Public Defender, Douglas County, Nebraska, counsel for appellant and appellee, respectively.

Letters reflecting such consent have been mailed to the Clerk of this Court under separate cover, and should be on file in the Clerk's office.

ARGUMENT

THE 1978 NEBRASKA CONSTITUTIONAL AMENDMENT PRECLUDING BAIL FOR ALL PERSONS ACCUSED OF FORCIBLE SEXUAL ASSAULT, WHERE THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY CREATING A CONCLUSIVE PRESUMPTION THAT RISKS IMPERMISSIBLY AN ERRONEOUS DEPRIVATION OF THE ACCUSED'S VITAL INTEREST IN PRETRIAL LIBERTY

Introduction

Article I, Section 9 of the Nebraska Constitution[1/] presents this

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1. Article I, Section 9 provides:

"All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the

Court with an unusual state provision affecting pretrial bail in non-capital cases. A few jurisdictions, to counsel's knowledge, have enacted "preventive detention" statutes or constitutional provisions that restrict bail for certain multiple offenders or allow trial courts to consider as a factor the "dangerousness" of the individual defendant.[2/] However, no state,

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1. (Fn. Cont.)

> proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." [Emphasis supplied.]

The emphasized words were added by amendment in 1978.

2. See D.C. Code Ann. § 23-1322; Ariz. Const. Art. II, § 22; Tex. Const. Art. V, § 11(a); Utah Const. Art. I, § 8; and Mich. Const. Art. I, § 15. See Petition of Humphrey, 601 P.2d 103, 108-111 (Okla. Crim. 1979) (appendix listing state constitutional and statutory provisions).

save Nebraska, has sought to deny bail outright to a class of non-capital defendants, based on the nature of the charged offense alone. Furthermore, states will traditionally assert the need to assure a defendant's presence at his trial as a reason for denying bail; in this case, the State of Nebraska makes no attempt at all to show that a person accused of a serious felony sex offense is more likely to flee than other non-capital defendants.

Rather, Nebraska seeks to justify the disparate, class-wide denial of bail in this case on the sole basis that the proponents of the 1978 amendment reasonably believed, and the voters so affirmed, that "sex offenders are prone to repeat sex offenses," and the purpose of denying bail to persons accused of such offenses was thus to protect

"society from repetition of these types of heinous crimes" (Appellant's Br. on Merits 28). The denial of bail for such persons, we are told, is "relevant to the legitimate state purpose of protecting society" (Appellant's Br. on Merits 32; emphasis supplied).[3] Whether this state purpose (or any other purpose apart from ensuring presence at trial) may constitutionally justify pretrial detention in the first instance is, of course, the question expressly reserved by the Court in Bell v. Wolfish, 441 U.S. 520, 534 n. 15 (1979). Yet, as the Eighth Circuit ultimately

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3. The state's posture was the same before the Court of Appeals, see Hunt v. Roth, 648 F.2d 1148, 1162 (8th Cir. 1981), and before the Nebraska Supreme Court, which had previously upheld the 1978 bail amendment against all constitutional attack, see Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, 113-114, cert. denied, 444 U.S. 920 (1979).

concluded in its Eighth Amendment analysis, the Nebraska provision effectively mandates that anyone accused of a forcible sex offense is to be considered dangerous, and indeed too dangerous as a potential recidivist, to allow his release on bail before trial. Hunt v. Roth, supra, 648 F.2d at 1164-1165. In sum, after concluding both that the Excessive Bail Clause of the Eighth Amendment applies to the States through the Fourteenth Amendment, 648 F.2d at 1155-1156, and that the Clause prohibits an unreasonable and arbitrary denial of bail as well as an excessive monetary amount, 698 F.2d at 1151-1162, the court below held that the "irrebuttable presumption" created by the Nebraska provision is indeed unreasonable and arbitrary, and on that ground violative of the Eighth Amendment, 648 F.2d at

1164-1165.

As amicus curiae we contend that the Nebraska 1978 amendment constitutes an impermissible conclusive presumption, but our argument is directed to the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment as such. We submit that the Nebraska provision, as it pertains to the non-capital sub-class of defendants accused of forcible sex offenses, is indeed an irrebuttable or conclusive presumption. Moreover, even given the legitimacy, in the abstract, of Nebraska's end of protecting society, the presumption is an impermissible one, not merely because of its over-inclusive nature, but because of the pretrial detainee's significant interest in liberty and the extreme risk of an erroneous deprivation of that liberty occasioned by the means Nebraska

has employed.[4/] The Nebraska provision therefore denies due process of law.

A. Nebraska's 1978 Bail Amendment Creates A Conclusive Presumption That Anyone Accused Of A Forcible Sex Offense Is Too Dangerous To Release Before Trial (I.e., Will Commit Such An Offense If Released)

The threshold question to be answered is whether the 1978 Bail Amendment creates a conclusive presumption. Does it provide, in effect, that anyone accused of a forcible sex offense, "where the proof is evident or the presumption great," shall not be admitted to bail because of his conclu-

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4. The issue of the 1978 bail amendment being a conclusive presumption violating due process was raised below (Plaintiff-Appellant Hunt's Brief in Eighth Cir. 29-34), was considered by the court below, albeit in an Eighth Amendment context, and has been raised explicitly by counsel for appellant before this Court (Appellant's Br. on Merits 30-32).

sively presumed dangerousness? The answer is "Yes."

Nebraska now claims, apparently for the first time, that even if the state judge makes the preliminary findings of proof being "evident" or the presumption "great," he has discretion to grant bail nonetheless. (Appellant's Br. on Merits 31.) This is clearly wrong, for two reasons. First, the plain meaning of the words of the Nebraska provision (Nebraska Const., Art. I, § 9, n. 1, supra) is that where the trial court preliminarily finds that the "proof is evident or the presumption great," the accused forcible sex offender is not to be granted bail under any circumstances. The key words are: "All persons shall be bailable . . ., except . . ." (Emphasis supplied.) "Bailable" means "capable of being bailed," and a

"bailable offense" is "one for which the prisoner may be admitted to bail." Black's Law Dictionary (5th ed. 1979) 128. "Shall" is, of course, "generally imperative or mandatory;" "it has the invariable significance of excluding the idea of discretion." Black's op. cit. supra, at 1233. And "except" means "but for," "not including," or "other than." Black's, op. cit. supra, at 501. Putting these meanings together, the key phrase means: "All persons are deemed 'capable of being bailed,' 'other than' accused traitors, forcible sex offenders, and murderers." Thus, while Article I, Section 9 does not expressly state that the defendants falling under the exception are not "capable of being bailed," that is the evident meaning. The language is a good example of an unambiguous "negative pregnant." Also,

if the language were not so construed, the exception would be mere surplusage, since under the state's interpretation the trial judge always retains discretion in any event. That is a disfavored result.

Even aside from the plain meaning of the words of Article I, section 9, however, the Nebraska Supreme Court appears to have rejected authoritatively the position now taken by Nebraska, in its opinion in Parker v. Roth, supra, 202 Neb. 850, 278 N.W.2d 106, 109, 113. We submit that the following expressions by the state's highest court, in the state court litigation immediately preceding this case, show that persons falling under the exception are automatically denied bail, where the proof is evident or the presumption great:

"On April 21, 1978, L.B.

553 was enacted by the Nebraska Legislature, proposing, subject to approval by the electorate, that Article I, section 9, of the Constitution of the State of Nebraska be amended to further exclude from bail persons charged with 'sexual offenses involving penetration by force or against the will of the victim' where the proof was evident or the presumption great." 278 N.W.2d at 109; emphasis supplied.

"In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail. . . .

We are therefore left with the question of whether the Legislature in the first instance, and the people thereafter, acted rationally and reasonably in concluding that, where the proof was evident or the presumption great that an individual had committed a sexual offense involving penetration by force or against the will of the

individual, such person should not be free on bail pending trial." 278 N.W.2d at 113; emphasis supplied.

While this Court may review a state supreme court's federal constitutional holding as to a state statute or constitution, Raley v. Ohio, 360 U.S. 423, 436 (1959), the Court will not revise the state court's threshold interpretation of what its own organic law means, for that is merely a question of state law. E.g., Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 626, 635-636 (1870); see generally C. Wright, Handbook on the Law of Federal Courts 542-543 (3rd ed. 1976). Thus, even assuming arguendo that Nebraska's eleventh-hour view of the Nebraska provision, as permitting residual judicial discretion, commended itself to this

Court, this Court would still not substitute its own interpretation for that of the Nebraska Supreme Court.

Thus the 1978 bail amendment does conclusively presume that an accused forcible sex offender shall be ineligible for bail, period. However, there is a more fundamental conclusive presumption here, lying just underneath the surface of the amendment: This category of non-capital felony defendants is too dangerous to society to be allowed release before trial, because the defendant will commit a forcible rape or like offense if released. This Court has in the past uncovered the true conclusive presumption underlying challenged legislation by "peeling away" one asserted governmental purpose, so as to assess other state objectives. E.g., Cleveland Board of Education v. LaFleur,

414 U.S. 632, 647 (1974); cf. McGowan v. Maryland , 366 U.S. 420, 426 (1961). See Chase, "The Premature Demise of Irrebuttable Presumptions," 47 U. Colo. L. Rev. 653, 688 ff. (1975-1976) [hereinafter Chase]. However, in this instance the Court does not need to "search" for the "real" or "objective" purpose underlying the 1978 amendment, since Nebraska has already stated very clearly what it is. Appellant's counsel has expressly identified the need to protect society from the repetition of "these types of heinous crimes" as the only purpose of the amendment. (Appellant's Br. on Merits 28.) Both the Eighth Circuit and the Nebraska Supreme Court, in their respective opinions, referred to the amendment's goal as being the protection of society from persons who were presumed to be sexual

recidivists and thus dangerous. Hunt v. Roth, supra, 648 F.2d at 1162-1165; Parker v. Roth, supra, 278 N.W.2d at 113-114. The legislative history of the bail amendment also demonstrates that the prevention of repeated forcible sex offenses was the sole objective of the proponents.[5/] The state does not contend, nor did it in the court below, that an absolute denial of bail to all persons charged with forcible rape or like offenses is necessary, or even rationally related, to assuring the

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5. Minutes of Committee on Constitutional Revision and Recreation, Hearings Concerning Legislative Bill L.B. 553 (Proposed Amendment to Nebraska Constitution, Art. I, § 9,) on Jan. 26, 1978, at p. 25 (statement of Sen. Herbert J. Duis, introducer); Nebraska Unicameral Legislature debate of April 12, 1978 on L.B. 553, at p. 08925 (incorporated in Exh. No. 10 of U.S. District Court Record in proceedings below, Civ. Nos. 80-0-361, 80-0-377, part of certified record in this Court).

presence of such persons, as a class, at trial. Hunt v. Roth, supra, 648 F.2d at 1162.

In sum, the 1978 bail amendment does establish a conclusive presumption: Anyone accused in Nebraska of forcible sexual assault, such as forcible rape, where the "proof is evident or the presumption great" as to the pending charge, is always too dangerous to be released before trial, in that he will commit such an offense while on bail. The State's characterization of the bail amendment to this Court, as continuing to allow judicial discretion in such cases, belies the plain meaning of the words, is contrary to binding state court construction, and is nowhere found in the legislative history. The basic issue now arises as to whether this conclusive presumption denies due

process of law for the affected defendants.

B. The Conclusive Presumption Of Dangerousness As To All Persons Accused Of Forcible Sex Offenses Denies Due Process Of Law As Guaranteed By The Fourteenth Amendment, In That The Pretrial Detainee's Basic Interest In Liberty Is Infringed Outright, The Risk Of Erroneous Deprivation Of That Interest Is Great, And The State's Interest, While Legitimate, Is Too Speculative To Have Sufficient Countervailing Force

The subject of conclusive or irrebuttable presumptions in due process adjudication has received considerable attention over the last decade. A brief review of this Court's opinions concerning this concept is thus pertinent in determining the constitutionality, under the Fourteenth Amendment's Due Process Clause, of the presumption in the case at bench.

1. Development of the Conclusive Presumption Doctrine Generally

From 1971 to 1974 this Court, by varying margins, struck down conclusive presumptions in a series of cases as violating due process. In Bell v. Burson, 402 U.S. 535, 541, (1971), the Court invalidated a Georgia law that appeared to presume conclusively an uninsured motorist's liability, for purposes of suspending a driver's license, if he failed to provide security for damages claimed due to an accident. In Stanley v. Illinois, 405 U.S. 645, 654-658 (1972), the Court held, by a 5-2 vote (Powell and Rehnquist, JJ., not participating,) that Illinois could not conclusively presume, for the sake of administrative convenience, that any unwed father was upon the death of the mother unfit to be a parent of his

children, thus mandating the termination of parental rights. While the state's goal of protecting children from unfit parents was legitimate, as was the goal in Bell, the state was required by due process to give the individual father an opportunity to show his fitness as a parent, because of the undeniably important private interest at stake. Id., at 654-658. In Vlandis v. Kline, 412 U.S. 441, 448-452 (1973), the Court, by a 6-3 vote, struck down as an impermissible conclusive presumption a Connecticut statute permanently characterizing a student, for purposes of charging higher tuition rates, as residing out-of-state based on his residence at the time of his admission application. The next year, in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 643-648 (1974), the Court concluded, by a 7-2 margin,

that pregnant public school teachers could not uniformly be required to take maternity leave five months before the expected birth, since there was a vital private interest in family autonomy at issue, and the purpose of keeping disabled teachers out of the classroom could not justify a fixed presumption of disability for all on a rigid date. Finally, in United States Department of Agriculture v. Murry, 413, U.S. 508, 514 (1973), the Court held by a 5-4 vote that a person seeking food stamps, who had previously been declared as a tax dependent by another, non-needy household member, could not arbitrarily be declared ineligible but should be allowed to show that he is indeed needy.

All these cases, save Bell v. Burson, were marked by dissents expressing doubts as to how far the

conclusive presumption doctrine and the preference for individualized hearings might go in overruling legislative classifications. See Stanley v. Illinois, supra, 405 U.S. at 665-666 (Burger, C.J. dissenting); Vlandis v. Kline, supra, 412 U.S. at 460 (Burger, C.J., dissenting); Cleveland Board of Education v. LaFleur, supra, 414 U.S. at 657 (Rehnquist, J., dissenting); U.S. Dept. of Agriculture v. Murry, supra, 413 U.S. at 525 (Rehnquist, J. dissenting). This concern has been echoed by some commentators, but others have defended the doctrine.[6/]

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6. See, e.g., Bezanson, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 Ind. L. Rev. 644, 651-654 (1974); Sewell, Conclusive and/or Substantive Due Process of Law, 27 Okla. L. Rev. 151, 153-154 (1979); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974) [hereinafter Harvard Note]; Note, The Conclusive Presumption

More recently, the Court has upheld a state's one-year residency requirement for obtaining a divorce, Sosna v. Iowa, 419 U.S. 393 (1975) (distinguishing Vlandis), a federal conclusive presumption of complicated pneumoconiosis arising out of coal mine employment, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (distinguishing Vlandis and Stanley), and a federal statute prohibiting widows and their children from receiving Social Security survivors'

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6. (Fn. Cont.)

Doctrine: Equal Process or Due Protection, 72 Mich. L.Rev. 800 (1974). But see Tribe, Structural Due Process, 10 Harv. Civ. Rights -- Civ. Lib. L.Rev. 269, 305-313 (1975) [hereinafter Tribe]; Ackerman, The Conclusive Presumption Shuffle, 125 U. Pa. L.Rev. 761-810 (1977) [hereinafter Ackerman]; Chase, supra, 47 Colo. L. Rev. 633-705 (1976); Note, Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur, 62 Geo. L.J. 1173, 1199-1200 (1974).

benefits unless they were related to the deceased wage earner at least nine months before his death, Weinberger v. Salfi, 422 U.S. 749 (1975) (distinguishing Vlandis, Stanley, and LaFleur). In Salfi, the Court emphasized that the challenged law was in the sphere of economic and social welare legislation, and thus individual determinations of eligibility were not required, even though some affected spouses who had married in good faith could not rebut the Congressional presumption that the short-lived marriage was a sham. 422 U.S. at 776-777. But lest one conclude for present purposes that Salfi read the conclusive presumption doctrine out of existence, it is vital to keep in mind the Salfi Court's grounds for distinguishing Stanley and LaFleur:

"Unlike the claims involved in Stanley [essential interest in child rearing] and in LaFleur [freedom of choice in matters of marriage and family life], a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." 422 U.S. at 771-772. 7/

This distinction was driven home

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7. Justice Rehnquist was less successful in Salfi in distinguishing Vlandis v. Kline, supra: "Unlike the statutory scheme in Vlandis . . . the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772. However, since the operative definitions of "residency" in Salfi and Vlandis are precisely parallel, as Justice Brennan notes in dissent, 422 U.S. at 803, the distinction is hardly tenable. If on the other hand Justice Rehnquist was asserting that the Social Security Act did not involve a conclusive presumption because the statute did not by its own terms make "bona fide marriage" the ultimate fact, nevertheless prior cases, such as LaFleur, make clear that the existence or non-existence of a conclusive presumption is to be determined not merely by the terms of the statute, but by reference to its legislative objective. Harvard Note, supra n. 6, at 1551; Chase, supra n. 6, at 689-690.

by Turner v. Department of Employment Security of Utah, 423 U.S. 44 (1975), a per curiam opinion handed down only five months after Salfi. The Turner Court invalidated Utah's conclusive presumption, for purposes of finding ineligibility for unemployment benefits, that all pregnant women are unable to work for a specified period surrounding the expected birth. Stressed the Court, analogizing to LaFleur:

> "The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake." 423 U.S. at 46; emphasis added.

From this development, certain due process principles as to the conclusive presumption doctrine in this Court may be distilled. First, such a presumption may be impermissible when the private

interest involved is a basic human liberty. Stanley v. Illinois, supra, 405 U.S. at 650-651; Cleveland Board of Education v. Lafleur, supra, 414 U.S. at 648; U.S. Dept. of Agriculture v. Murry, supra, 413 U.S. at 518 (Marshall, J., concurring); Turner v. Dept. of Employment Security of Utah, supra, 423 U.S. at 46. Second, such a presumption may be invalid when its purported underlying purpose appears to be defeated through arbitrary application. Bell v. Burson, supra, 402 U.S. at 541; Vlandis v. Kline, supra, 412 U.S. at 452; cf. Weinberger v. Salfi, supra, 422 U.S. at 772 (maj. opn.), 803 (Brennan, J., dissenting). Finally, to summarize, a conclusive presumption requires courts to weigh carefully the private and governmental interests involved, the risk of erroneous deprivations of the

private interest, and the acceptability of the greater adminstrative burden created by individualized determinations. LaFleur, supra, 414 U.S. at 648; Murry, supra, 414 U.S. at 518-519 (Marshall, J., concurring); Turner, supra, 423 U.S. at 46; Salfi, supra, 422 U.S. at 771-772. This test as to the need for individualized determinations of ultimate factual issues merely involves an application of the overarching due process analysis of Mathews v. Eldridge, 424 U.S. 319 (1976), which governs any statutory attempt to infringe on an interest protected by due process. As was said in Mathews, the factors to be balanced are:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 335. 8/

2. Due Process Analysis of the Conclusive Presumption In the Case at Bench

Thus far we have shown that the Nebraska 1978 bail provision does indeed

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8. As some commentators have suggested, the use of such an analysis to determine the validity of conclusive presumptions is really a "new" procedural due process; there is no attempt to say that the legislature's statutory purpose is irrational, and we are not suggesting a return to outmoded substantive due process, Lochner style. See Ackerman, supra n. 6, at 779-798, 808-811; Chase, supra n. 6, at 665-670, 685-705; Tribe, American Constitutional Law, § 16-32, at 1095-1096 (1st ed. 1978); Tribe, supra n. 6, at 284-289 (1975). This restrictive use of conclusive presumption analysis -- i.e., only when vital human interests are at stake -- will derail the "virtual engine of destruction" of legislative classifications that Justice Rehnquist, writing for the Salfi Court, felt the doctrine was in danger of becoming, 422 U.S. at 772.

create a conclusive presumption of the unacceptable dangerousness of accused forcible sex offenders, and we have argued that conclusive presumption analysis as it has developed from Bell through Salfi and Turner is an entirely worthy doctrine in a case of this nature. We now proceed to a discussion of the constitutionality of the particular conclusive presumption before the Court, considering the significance of the detainee's interests, the state's interest in being able "to presume rather than prove," and the risk of erroneous deprivation of the detainee's interest by the procedure currently employed. See Mathews v. Eldridge, supra, 424 U.S. at 335. We submit that in the pretrial phase of a criminal case, where a vital human interest affecting liberty is at stake and there

has been as yet no legal adjudication of guilt, the Fourteenth Amendment's Due Process Clause requries individualized hearings to protect that interest adequately.[9/]

Employing the three-fold test of Mathews v. Eldridge, supra, 424 at U.S. at 335, it is evident, first, that the pretrial detainee's interest in liberty is indeed vitally important, assuming arguendo that it does not attain the

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9. This suggested due process principle thus would not by its terms apply to statutory conclusive presumptions following conviction, such as mandatory minimum prison sentences, mandatory denials of probation, or habitual offender statutes. Such mandatory post-conviction statutes generally raise questions of a different sort, such as Eighth Amendment issues of cruel and unusual punishment. Compare Rummel v. Estelle, 445 U.S. 263, 284-285 (1980) (recidivist offender statute, raising issue of cruel and unusual punishment) with Bell v. Wolfish, supra, 441 U.S. at 535 (pretrial conditions of confinement raising issue of due process).

status of a constitutionally guaranteed "fundamental right." "Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). As this Court has said, "Bail . . . is basic to our system of law," Schilb v. Kuebel, 404 U.S. 357, 365 (1971), and,

> "[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. To infer from the fact of indictment alone a need for bail in

an unusually high amount is an arbitrary act." Stack v. Boyle, 342 U.S. 1, 4-6 (1951) (dictum).

Moreover, the interest in liberty is all the more significant for an accused person, because once he is legally detained, constitutional protection as to his conditions of confinement is diminished. At that point, the due process guarantee for an accused prevents only conditions of confinement that amount to "punishment," a term this Court now defines by reference to the government's purpose, not the impact on the accused. Bell v. Wolfish, supra, 441 U.S. at 538. Therefore, assuming arguendo the legality of the initial decision to detain, the accused may be imprisoned for month after month before coming to trial, traditionally in a detention facility or local jail, which

most authorities agree may be the worst of all penal environments, inferior to prison itself. See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 24 (1967); Thaler, Punishing the Innocent: The Need For Due Process and the Presumption of Innocence Prior to Trial, 1978 Wis.L. Rev. 441, 452, and other authorities cited therein.

Beyond the gross impact of the incarceration itself, the pretrial detainee suffers other sorts of "grievous loss," cf. Morrissey v. Brewer, 408 U.S. 471, 4821 (1972). He is likely to lose his job if he has one, be deprived of income, and be injured in his relationships with his family. See Gerstein v. Pugh, 420 U.S. 103, 114 (1975); United States v. Marion, 404

U.S. 307, 320 (1971); Thaler, supra, at 452; Comment, Incarcerating the Innocent: Pretrial Detention in Our Nation's Jails, 21 Buffalo L.Rev. 891, 901 (1972). He suffers the stigma that attaches from the mere fact of detention. Thaler, supra, at 452-454. But perhaps the most significant effects of pretrial detention for an accused relate to his ability to prepare for the upcoming trial, his access to counsel, and the final results. A detainee's ability to prepare an adequate defense is greatly impaired, and consultation with an attorney and general access to counsel becomes much more difficult. See Stack v. Boyle, supra, 342 U.S. at 8; Smith v. Hooey, 393 U.S. 374, 379-380 (1969); Van Atta v. Scott, 27 Cal.3d 424, 435 nn. 9, 10, 166 Cal.Rptr.149 (1980), and authorities cited.

Finally, several statistical studies share the conclusion that the defendant at liberty pending trial stands a better chance of not being convicted or, if convicted, of not receiving a prison sentence. Ares, Rankin & Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N.Y.U.L.Rev. 67, 86 (1963) [hereinafter Ares Study]; Rankin, The Effect of Pre-Trial Detention, 39 N.Y.U.L.Rev. 641, 642 (1964) [hereinafter Rankin Study]; Study, Preventive Detention: An Empirical Analysis, 6 Harv.Civ.Rts. -- Civ.Lib.L.Rev. 289, 347 (1971) [hereinafter Harvard Study]; The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City, 8 Crim.L. Bull. 459, 468 (1972) [hereinafter Bellamy Study]; see generally Thaler, supra, at 455-459.

For example, Rankin's study, supra, found that only one factor -- status as a detainee -- not considerations such as previous record, amount of bail, quality of counsel, or stable employment, was tied disproportionately to an unfavorable outcome. 39 N.Y.U.L. Rev. at 652-655. One commentator has concluded that this disparity in conviction rates resulting from pretrial detention as such is due most of all to the widespread use of plea bargaining, in which the incarcerated defendant is willing to plead guilty in return for a sentence of "credit for time served". Thaler, supra, at 455-459.

In sum, the accused has a vitally important liberty interest in not being arbitrarily labeled as dangerous and thus not bailable as a matter of law. At the very least, this pretrial

interest in liberty, while conditioned on reasonable bail under the Eighth Amendment, is worthy of zealous protection by the courts, and thus is entitled to at least an "intermediate" level of review. Cf. Turner v. Department of Employment Security of Utah, 423 U.S. at 46; Hampton v. Mow Sun Wong, 426 U.S. 88, 102-103 (1976) (aliens deprived of federal civil service employment; intermediate standard of review employed to assess issue of due process violation); United States Department of Agriculture v. Murry, supra, 413 U.S. at 518-519 (Marshall, J., concurring); see generally Tribe, American Constitutional Law, supra, § 16-31, at pp. 1089-1092.

With respect to the strength of the governmental interest involved -- the protection of society from recidivist rapists and other forcible sex offenders

-- there can be no question that this interest is substantial and totally legitimate.[10/] As this Court stated in Coker v. Georgia, 433 U.S. 584, 597 (1977), and as the Court of Appeals below concluded, Hunt v. Roth, supra, 648 F.2d at 1162, forcible rape is a highly reprehensible and serious crime. There is no question that society should be able to protect itself from rapists and like offenders, considering the end in itself.

The basic due process issue here concerns neither the strength of the detainee's interest in liberty nor

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10. By this we mean the protection of society from recidivism by persons already convicted of such offenses. We are not referring at this juncture to the ultimate question of whether the dangerousness of an accused may ever be considered as a factor in the bail decision, an issue this Court need not decide in this case. See also n. 11, supra.

Nebraska's desire to prevent future forcible rapes and similar crimes, for both interests are highly important. Rather, the issue is the particular procedure employed by Nebraska to accomplish its objective. In light of the accused's vital interest in his freedom, which requires a close, if not strict, scrutiny by this Court of a law infringing upon it (Turner, supra; cf. Mow Sun Wong and Salfi, supra), must Nebraska's legitimate end of societal protection be achieved through more individualized means? Under the test of Mathews v. Eldridge, supra, we submit that the key questions are first, whether Nebraska's wholesale denial of bail to accused forcible sex offenders, where the proof is evident or the presumption great, creates an unacceptable risk of erroneous deprivation of the

detainee's liberty, and second, whether an individualized hearing procedure that did not presume the ultimate fact at issue -- the purported dangerousness of the accused -- would be administratively feasible. Mathews v. Eldridge, supra, 424 U.S. at 335; U.S. Department of Agriculture v. Murry, supra, 413 U.S. at 518 (Marshall, J., concurring).

To assess properly the risk of erroneous deprivations of liberty posed by the Nebraska 1978 bail amendment, it must be recognized that there are three related riddles of prediction involved in this conclusive presumption of the dangerousness of accused rapists and like offenders if released before trial. Each riddle is fraught with difficulty.

First, predictions of dangerousness or future violence on the part of an individual are generally unreliable as

an empirical matter, even when studying already convicted offenders, whether by resort to comparisons of recidivism rates, psychiatric "expertise", or other factors.[11/]

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11. As already discussed, see discussion at n. 10, supra, and as the Eighth Circuit has pointed out, Hunt v. Roth, supra, 648 F.2d at 1164, we do not reach, and this Court need not reach, the difficult question of whether the dangerousness of the individual defendant, if capable of determination, can ever be considered as a factor in a pretrial release decision by a judge who is exercising independent discretion. The courts have divided over this issue. Compare United States v. Wind, 527 F.2d 672 (6th Cir. 1975), and United States ex rel. Covington v. Coparo, 297 F.supp. 203, 207 (S.D.N.Y. 1969), with United States v. Beaman, 631 F.2d 85, 87 (6th Cir. 1980), and In re Underwood, 9 Cal.3d 345, 348-349, 107 Cal.Rptr. 401 (1973) (based on Cal. Const., Art. 1, § 6). Since in this case the Nebraska constitutional provision precludes any exercise of discretion on the dangerousness issue with respect to forcible sex offenders, but rather mandates that dangerousness be presumed for such defendants, we consider here the general issue of predicting dangerousness solely with respect to the reasonableness of the "fit" between means and

The conclusion of one study is that predictions of dangerousness by psychiatrists in civil commitment proceedings are 65% to 85% wrong. See Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 713 (1974). Another study of over 4,000 California Youth Authority wards could not identify any "operationally practical" means to predict assaultive potential. See Wenk, Robison & Smith, Can Violence Be Predicted, 18 Crime & Delinquency 393 (1972). A Harvard study found no correlation between the type of crime for which a person was first

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11. (Fn. Cont.)

ends that is involved in Nebraska's conclusive presumption. See e.g., Harvard Note, supra n. 6, at 1551-1556; The Supreme Court, 1974 Term, 89 Harv.L.Rev. 83-84 (1975).

arrested and the severity of the second offense if there was one. Harvard Study, supra, 6 Harv. Civ. Rights -- Civ. Lib. L.Rev. at 342.

A second difficulty inherent in Nebraska's conclusive presumption is the prediction of dangerousness as an empirical matter for those who have only been accused, and not yet convicted of crimes. If such predictions are based on anything, then presumably they rest on the two-part notion that, at least in certain identifiable cases, the accusation is true (i.e., the defendant committed the crime in question), and second, the commission of the crime for which charges are pending means that the person will commit another similar crime if given the opportunity. This two-step premise often founders, however, at the first step. The well-known Bellamy

study of the effect of pretrial detention on conviction rates in New York City showed that 20% of the defendants who remained confined over the period of the study received a dismissal (compared to a 50% dismissal rate for those who were released before trial). Bellamy Study, supra, 8 Crim.L.Bull. at 468. Thus, for at least the 20% who received dismissals the presumption of recidivism by detainees breaks down, to the extent that it is based on the fact of conviction. As to the second step, while statistics as to the amount of recidivist crime on bail remain elusive, one commentator has summarized the results of certain studies during the 1960's as follows:

> "Thus, while certainty is unattainable, present indications are that the total number of felony defendants indicted for other felonies

> allegedly committed on pretrial release is less than 10% of all accused felons on pretrial release. Furthermore, the number of defendants charged with and convicted of violent crimes on bail, whatever the nature of the original felony charge, is probably only about 3 to 5%." Hickey, Preventive Detention and the Crime of Being Dangerous, 58 Geo.L.Rev. 287, 302 (1969) [hereinafter Hickey].

Also, even assuming arguendo that preventive detention, if properly imposed at all, should be limited only to those situations where there is a significant likelihood of the commission of a serious crime while on bail, it is extremely difficult to predicate the commission of serious crime on bail upon the seriousness of the pending charged offense. No study of crime on bail, to counsel's knowledge, has yet demonstrated any significant correlation between the seriousness of the crime

charged and the seriousness of the crime, if any, committed on bail. See Hickey, supra, at 304-308. Professor Dershowitz has summarized well the intractability of the problems posed in predicting violent crime on bail:

> "Predictions of human conduct are difficult to make, for man is a complex entity and the world he inhabits is full of unexpected occurrences. Predictions of rare human events are even more difficult. And predictions of rare events occurring within a short span of time are the most difficult of all. Acts of violence by persons released while awaiting trial are relatively rare events (though more frequent among certain categories of suspects), and the relevant time span is short. Accordingly, the kind of predictions under consideration begin with heavy odds against their accuracy. A predictor is likely to be able to spot a large number of persons who would actually commit acts of violence only if he is also willing to imprison a very much larger number of defendants who would not, in fact,

> engage in violence if released." Dershowitz, "Preventing 'Preventive Detention'", New York Review of Books, March 13, 1969, at 24-25, quoted at Hickey, supra, at 305 n. 112.

Indeed, perhaps the worst reason for a preventive detention statute, which obviously focuses on the issue of crime on bail, is alarm over a rising crime rate in general, which may bear very little correlation to the crime rate on bail. See Hickey, supra, at 303.

The third predictive riddle involved in the Nebraska scheme relates to the "singling out" of accused forcible sex offenders, as opposed to others accused of violent non-capital crimes, for special "wholesale" treatment. That is to say, even if this Court finds a sufficient basis of accuracy for the first two levels of prediction, there is the further issue inherent in this

conclusive presumption: i.e., the labeling of accused forcible sex offenders as being more dangerous if released before trial than others accused of non-capital violent felonies. Again, the Harvard Study, referred to supra, showed no correlation between the type of crime of the first offense and the severity of the second offense, if there was one. 6 Harv.Civ.Rts. -- Civ.Lib.L.Rev. at 342. Also, the Harvard study attempted to correlate 26 different variables to the commission of crime on bail, but the conclusion was that none of them evidenced a significant correlation. The correlation coefficients if the defendant had committed dangerous crimes in the past ten years, or had used violence in the initial crime for which charges were pending, or had used a weapon in the initial crime for which charges were

pending, were .219, .062, and .054, respectively. Harvard Study, supra, at 392.

Moreover, Nebraska's interest in protecting society through the means it has employed herein can only be justified, even conceivably, if this particular class of accused forcible sex offenders is more likely to commit further violent crime on bail than all other classes of defendants accused of non-capital violent crimes. However, the only relevant evidence known to this counsel indicates to the contrary. According to a detailed study conducted by the National Bureau of Standards in 1970, analyzing comparative recidivism rates of those released pending trial, persons accused of sexual assault actually have a lower incidence of re-arrest while on bail than those accused

of many other crimes. The study also found that of those persons accused of sexual assault, released on bail, and then subsequently re-arrested, there were no subsequent re-arrests for further sexual assaults or other sex offenses. National Bureau of Standards, Compilation and Use of Criminal Court Data in Relation to the Pre-trial Release of Defendants: Pilot Study (1970), at 135, 168.

In sum, we submit that the risk of erroneous deprivation of pre-trial liberty among the class of defendants at issue in this case is substantially and unacceptably high. That is to say, there is a large potential number of such defendants who would not commit serious crimes, particularly forcible sex offenses, if released before trial. Moreover, the fact that Nebraska's

conclusive presumption against bail applies only "where the proof is evident or the presumption great" does not save it from the above-described predictive difficulties. That criterion merely requires the trial court to find a certain degree of likelihood that the defendant committed the forcible sex offense for which charges are pending. There is no requirement in the provision, however, that the trial court also find, in light of the likelihood of commission of the charged offense, that the defendant will also commit further serious crime if released. Indeed, even if a trial court felt it could make such a determination in individual cases, predictions of future offenses that flow from the likelihood of a recent offense being committed are inherently unreliable as a general proposition. Thus,

under the "proof is evident or presumption great" language, the trial court is neither making a prediction about the future, nor could he do so in any scientific manner. Nebraska's requirement that such proof or presumption be found obviously limits to some extent the number of accused rapists and like offenders who would otherwise be automatically detained, but it is quite irrelevant to the ultimate prediction which Nebraska has mandated in all such cases, and thus it does not cure the fatal defect of gross over-inclusiveness.

By contrast, there are only slight administrative burdens posed by requiring Nebraska to prove, rather than to presume, the dangerousness of the accused to society if he were to be released on bail. Obviously, under the present Nebraska scheme the trial court

must hold a bail hearing in any event, so as to determine whether the "proof is evident or the presumption great" as to the charged offense. The elimination of the conclusive presumption of dangerousness will simply require the prosecution to show, and the court to find, that the defendant as an individual is sufficiently dangerous, in terms of future potential offenses, to be ineligible for release pending trial.[12/]

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12. Clearly there are additional questions posed if the conclusive presumption is eliminated. We are not suggesting, instead of the present irrebuttable presumption, that there be a "rebuttable" presumption of dangerousness, which the forcible sex defendant would have to overcome through some form of showing. Rather, since it is the state that has the interest of protecting society, that desires to have the accused detained to serve that interest, and that has best access to the damaging evidence drawn from the investigation of the offense which proportedly shows dangerousness, the state should retain the burden of proof on that issue. As to the standard of

Furthermore, the additional burden generated by this widening of the scope of Nebraska's present pretrial bail

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12. (Fn. Cont.)

proof, we submit that the prosecution should be required, at the very least, to show the "dangerousness" of the accused by clear and convincing evidence. See United States v. Edwards, 430 A.2d 1321, 1358-1360 (D.C.App. 1981) (Ferren, J., concurring in part and dissenting in part) (concerning burden of proof issue in District of Columbia pretrial detention law); cf. Addington v. Texas, 441 U.S. 418, 425-433 (1979) (clear and convincing evidence standard is sufficient for imposing involuntary civil commitment, to protect the community from dangerous tendencies of some who are mentally ill). If as we suggest this Court strikes down Nebraska's conclusive presumption, but does not reach the final question of whether dangerousness may ever be considered as a factor for denying bail, then, of course, Nebraska will have a further opportunity to pass statutes providing for the burden of proof, notice, confrontation, and the like. See generally United States v. Edwards, supra, 430 App.2nd 1321 (interpreting District of Columbia pretrial detention statute). Therefore, consideration of these questions now is not necessary to the resolution of the case at bench.

hearing is a tolerable one. While an evidentiary hearing will be required, instances of past or present conduct on which the state proposes to rely to show dangerousness should not be difficult to ascertain, since the state has full access to arrest and conviction records, etc. In addition, Nebraska has a countervailing interest, although Nebraska itself might not agree, in also ensuring the basic fairness of adjudication and the accuracy of findings on such an important issue as dangerousness -- "in short, an interest in not imprisoning anyone unnecessarily. [citations omitted.]" U.S. v. Edwards, supra, 430 App.2d at 1356 (Ferren, J., concurring in part and dissenting in part).

We submit that, in light of the pretrial detainee's vital interest in liberty which is being infringed, and

the requirement of heightened scrutiny by this Court which flows from that fact, the application of the doctrine is entirely appropriate in this case. The use of the conclusive presumption doctrine as a tool to review only those statutes infringing on vital human interests may have appeal to this Court, as compared to the traditionally rigid, two-tiered "strict scrutiny" and "rational basis standards" for equal protection review. It is evident that conclusive presumption analysis, at least in instances like the case at bench, or Stanley, or LaFleur, has equal protection components. After all, a particular group -- pretrial detaineees accused of forcible sex offenses, or unwed fathers, or pregnant schoolteachers -- are being singled out for arbitrary treatment, in comparison to persons

similarly situated, in situations where arguably "fundamental" rights are implicated. According to traditional equal protection doctrine, a classification that has a disparate impact on fundamental rights (either those expressly or impliedly guaranteed by the those expressly or impliedly guaranteed by the Constitution)[13] must be subjected to strict scrutiny, with the very likely consequence of outright substantive invalidation.[14] However, just as equal protection analysis has become more flexible in recent years, providing for an "intermediate" standard of review in

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13. See San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1,38 (1973).

14. See, e.g., Gunther, The Supreme Court 1971 Term --Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection, 86 Harv.L.Rev. 1, 8.

cases of sex discrimination, for example,[15] this case, like Stanley and LaFleur, provides the Court with an opportunity to employ an intermediate standard for purposes of due process.

Let us assume arguendo that a pretrial detainee's interest in liberty (which in the American criminal justice system traditionally means his opportunity for bail) is vital enough to invalidate a conclusive presumption against it, but is not so fundamental in the constitutional scheme so as to trigger a "strict scrutiny/compelling state interest" test. All that signifies is that the state must allow the detainee a hearing where he has the chance to point to all pertinent factors

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15. E.g., Reed v. Reed, 404 U.S. 71, 76 (1971); Craig v. Boren, 429 U.S. 190, 204 (1976).

demonstrating that he as an individual is an acceptable bail risk. As Professor Tribe puts it, the true import of Weinberger v. Salfi, supra, is:

> ". . .that the invalidation of irrebuttable presumptions [is] but one of several techniques included in intermediate scrutiny, and that the techniques, far from representing a death-knell for the legislative use of per se rules, simply requires legislatures to proceed on a less wholesale basis if possible when certain sensitive matters are at stake. If it is understood that this approach is taken only when the Court might otherwise have invalidated the legislation more sweepingly, it emerges not as a threat to legislative flexibility but as a restrained form of intervention compared with the more conventional form of total invalidation. [fn. omitted.]"

Tribe, American Constitutional Law, supra, §§ 16-30, pp. 1088-1089; emphasis added. See also Ackerman, supra n. 6, at 773-776; Chase, supra n. 6 at 680-684. However, we enter a basic caveat:

as amicus curiae we offer conclusive presumption analysis as an alternative argument. If this Court were to hold, as counsel for appellee is arguing, that appellee Hunt and others similarly situated have a fundamental constitutional right to bail, and under the strict scrutiny standard thus triggered the state lacks a compelling state interest (i.e., anticipated dangerousness of sex offenders per se will never suffice), then there has been a denial of equal protection of the laws requiring an outright invalidation of the state's proferred purpose, as well as the particular Nebraska provision at issue. That is to say, under such a holding consideration of the potential dangerousness of only accused forcible sex offenders, as opposed to defendants accused of other non-capital violent

crimes, would never be a valid state objective, whether accomplished through individual determinations or not. But if this Court is not willing to go that far, and finds that the detainee's interest in liberty on bail is important, but not constitutionally guaranteed, then the due process issue of the conclusive presumption herein become not only pertinent, but an issue that the Court must decide.

Having in mind the nature and extent of that liberty interest, the inherent weaknesses underlying the general predictive assumptions of the Nebraska provision, and the rather enormous risk of erroneous deprivations of the detainee's liberty, this conclusive presumption must fall. As in Vlandis v. Kline, supra, 412 U.S. at 452, if Nebraska purports to be truly concerned

with future dangerousness, the Fourteenth Amendment's Due Process Clause requires Nebraska to allow the individual accused forcible sex offender, like those accused of other non-capital violent crimes, to show that he is indeed not a dangerous risk to the community if released before trial. Assuming arguendo that the protection of society may be a legitimate reason to deny bail, individualized hearings are required, as in Stanley v. Illinois, supra, 405 U.S. at 654-658, Cleveland Board of Education v. LaFleur 414 U.S. at 647-648, and Turner v. Department of Employment Security of Utah, supra, 423 U.S. at 46, since the additional administrative burden does not compare in significance to the basic human liberites at stake (see Escandar v. Ferguson, 441 F.Supp. 53, 59-60 (S.D.Fla. 1977). In

this context, the essential arbitrariness of the Nebraska provision violates due process.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

DATED: December 18, 1981

Respectfully submitted,

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